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No. 81-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARY ELLEN CRAWFORD, ETC., ET AL.,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

BRIEF FOR HONORABLE BOBBI FIEDLER, MEMBER OF CONGRESS AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the passage of Proposition 1 constitutes state action that effects an inherently suspect class in such a manner as to cause that class to suffer a federally cognizable wrong.

2. Whether fundamental principles of federalism protect states in the exercise of their right to experiment with the expansion and retraction of privileges that at no time contravene the requirements of the United States Constitution.

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BRIEF IN SUPPORT OF THE JUDGMENT OF THE CALIFORNIA COURT OF APPEAL SECOND APPEALLATE DISTRICT

This brief is submitted with the consent of the parties.

STATEMENT OF THE CASE

Amicus incorporates by reference Respondent's statement of the case.

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioners assert that this case is only superficially concerned with the mandatory transportation of students. (Petitioner's brief, hereinafter for Pet. at 30) With this, *amicus* heartily concurs. For although the facts giving rise to this case concern the integration of the Los Angeles school system, the present procedural posture of the instant case addresses the singular question of whether or not the United States Constitution permits a state to change its laws so as to bring them into conformity with the United States Constitution.

Petitioners, breathtakingly, answer that question in the negative. (Pet. at pp. 96-98) Of course, Petitioners wisely do not phrase the issue in that form. Rather, after first noting that this case is only superficially about mandatory transportation of students, petitioners proceed to entomb their analysis in the full panoply of mandatory student transportation law, down to the last arcanum.

A clear analysis of the instant case must start with a brief overview of the decision below by the California Court of Appeal, reported at 113 Cal App. 3d 633, 170 Cal Rptr. 495 (1980). There, the court held that Proposition 1 was constitutional and that the trial court's desegregation plan violated Proposition 1 because the record did not contain any evidence of intentional, *de jure* segregation of students. Petitioners have not challenged the finding of no *de jure* segregation. Nor does the record disclose any.

Thus we reach the first central point to keep in mind throughout this case: at no time has the Los Angeles School

Board committed or omitted an act which would constitute a violation of the Fourteenth Amendment to the United States Constitution.

Rather, the California courts had held that, based on the California Constitution, not the United States Constitution, a remedy should be provided if reasonable and feasible, to correct even *de facto* segregation. *Crawford v. Board of Education,* 113 Cal 3d 633.

During the protracted pendency of that litigation, specifically during the early stages of a six month trial to determine the remedy required by the California Constitution, Proposition 1 was passed by the California Electorate by a two to one majority.

In summary essence, Proposition 1 expressly conformed California Constitutional law regarding mandatory student transportation to the requirements of the United States Constitution, with the exception that it still permitted mandatory student transportation for purposes of desegregation if a school board voluntarily chose it.

It is the position of *amicus* that the determinative proposition of this case is that the passage of Proposition 1 does not impose a federally cognizable burden on any person or group of persons. Moreover, *amicus* submits that — absent any federally cognizable burden — evidence or inferences regarding the supposed subjective intent of the collective electorate of Proposition 1 is irrelevant.

Although the instant case hinges on this one unambiguous point, the decision in this case will have sweeping implications for the future of federalism. Thus, in the discussion of question two, *amicus* will review the importance of allowing flexibility in the several States when they experiment with different legal approaches to resolving the pressing social challenges facing the country.

I

THE PASSAGE OF PROPOSITION 1 DOES NOT EFFECT AN INHERENTLY SUSPECT CLASS IN SUCH A MANNER AS TO CAUSE MEMBERS OF THAT CLASS TO SUFFER A FEDERALLY COGNIZABLE WRONG.

Petitioners' assault on Proposition 1 is premised on the assertions that; 1) on its face it embodies an impermissible racial classification; and, 2) that both its purpose and effect is to disproportionately affect a racial minority. Thus petitioners reason, only a compelling state interest will justify such an act. And, of course, petitioners assert that no such compelling interest is presented. (Pet. at pp. 34, 54, 63, 64)

Amicus submits that Proposition 1 is racially neutral, and that more significantly, petitioners are never able to identify a federally cognizable wrong that results from the passage of Proposition 1.

Initially, it may be helpful to lay out each of the elements of the point of law that petitioners are attempting to assert. The fourteenth amendment was enacted, in large part to vindicate the rights of the Negro population and restrict discriminatory actions by state governments in a variety of contexts. Thus, any state statute that involved racial classifications was subjected to "strict scrutiny". (See *Slaughter-House Cases,* 83 U.S. 36, 67-72 (1873)).

An explicit racial classification that significantly disadvantages members of that racial classification can only be justified by a compelling state interest. *McLaughlin v. Florida,* 379 U.S. 184 (1964).

If the classification is not explicit, then it may be proved by its disproportionate racial impact. *Wright v. Council of City of Emporia,* 407 U.S. 451 (1972). The racial classification may also be proved by the intent or motive or purpose behind it. *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). Moreover, the impact may be evidence of the intent, although impact alone does not trigger the compelling interest rule. *Washington v. Davis,* 426 U.S. 229 (1976). Even if the disproportionate impact is foreseeable, that alone will not be determinitive. *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973).

But irrespective of how the racial classification is invoked (expressly on its face, by showing intent, by showing effect, or some combination) it is axiomatic that not only must the consequence be quantifiably disproportionate in its effect on a racial group, it must also be of a quality that creates a burden on this group that is legally cognizable in the court in which the plaintiff is asserting the wrong.

Although this may seem obvious, it is a step in the analysis of a challenged state action that is often taken for granted. In the setting of school desegregation cases the critical search is usually not for the harm (ie, segregation), but for the state action that may have caused it. Indeed, the very language used to dichotomize such cases, *de facto* and *de jure,* addresses the presence or absence of causative state action. The harm of segregation is taken for granted.

Thus, in *Brown v. Board of Education,* 347 U.S. 483 (1954) the key to the Courts analysis was separate school systems for the different races. In *Arlington Heights, supra,* this court was looking for evidence of abnormal process to show intent and thus state action. See also, *Keys v. School District No. 1,* 413 U.S. 289 (1973); *Green v. County*

School Bd., 391 U.S. 430 (1968); and *Swann v. Charlotte-Mecklenburg Bd. of Educ.* 402 U.S. 1 (1971).

In the case at bench, however, the relevant search is not for the state action, but for the federally cognizable harm. Obviously the enactment of a state constitutional amendment is a state action. And although *amicus* vigorously asserts that the enactment of Proposition 1 was not motivated by any improper motives (*amicus* joins in the admirable defense by respondent and the court below on this point), nonetheless, *amicus* respectfully submits motive is irrelevant if there is no federally cognizable harm.

At the risk of stating the obvious, in a hypothetical case where a statute states on its face the intent to harm a racial minority, if instead the result is to benefit that minority, then the fourteenth amendment could not be invoked because there would be no wrong to remedy. As this Court has held in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* a federal remedial power may be exercised "only on the basis of a constitutional violation" and "(a)s with any equity case, the nature of the violation determines the scope of the remedy." 402 U.S. at 16.

In *Milliken v. Bradley,* 418 U.S. 717, 744 (1973), this Court stated with great clarity the established rule:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation."

And, indeed, if there is no constitutional violation, there is no remedy:

> "To approve the remedy ordered by the Court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I and II or any holding of this Court." 418 U.S. at 745.

Thus, *amicus* submits that unless petitioners can demonstrate the federally cognizable constitutional harm that resulted from the passage of Proposition 1, petitioners' case must fall.

Petitioners describe the alleged harm thusly:

> "By amending its constitution so as to withhold the full panoply of otherwise available state court remedies from those—and only those—who challenge racial separation in violation of the state's own laws, the State of California has created not a dual *school* system (although such a system might be the result) but a dual court system: a first class judicial system for whites and for problems unrelated to race, and a second-class judicial system, its remedial capacity radically restricted, for minorities and for problems of racial isolation." (emphasis in original) (Pet. at pp. 30-31)

In other words, petitioners are asserting that the United States Constitution, as authoritatively interpreted by this Court, is "second class" (Pet. at p. 31). It is ironic to note that petitioners now appeal to this "second-class" (Pet. at p. 31) judicial system to admit its inferiority and to make such admission by overruling the "first class" judicial system's (i.e., the California Courts) rejection of petitioner's claim.

Initially, it needs to be noted that petitioners misconstrue the express language of Proposition 1, which misconstruction undermines the basis for their contention. Petitioners state: "Proposition 1 is directed against court-ordered student assignment only when student assignment is ordered for the purpose of desegrating the public schools. Mandatory student assignment for any other purpose—such as relieving overcrowded schools or fulfilling the educational rights of handicapped children—remains untouched." (Pet. at p. 45, note 25)

Petitioners are wrong. Proposition 1, as quoted in petitioners' own brief at pages 4-6 states in relevant part:

> ". . . provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State . . . . any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment . . . with respect to the use of pupil school assignment or pupil transportation. . . ." Article 1 sec. 7a para. 1 California Constitution.

There is no mention of purposes of desegregation, as petitioner claim (Pet. at p. 45 note 25). Moreover, in paragraph 4 of proposition 1, as quoted from petitioners brief at page 6, is the following language:

> "Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision."

Thus, if anything, power in excess of the 14th Amendment is granted back to school boards to voluntarily choose to require busing, but not for other purposes such as helping handicapped children or overcrowded schools. So if anything, busing for integration is benefited as against busing for other purposes.

Petitioners attempt to get around this glaring hole in their argument by justifying their patently wrong interpretation of Proposition 1 with the claim that respondent and the court below both interpreted. Proposition 1 the way petitioners do. (Pet. at pp. 35-36; 42 note 23)

Though facile, this claim is not convincing. The language cited by petitioners in the opinion of the court below (113 Cal App3d at 653) involved that Court analysing Proposition 1 in contrast to Proposition 14 (See *Reitman v. Mulkey,* 387 U.S. 369 (1967)). The Court below was not addressing the question of whether Proposition 1 limited its

restriction to "purposes of integration". Thus its language cannot be construed as an authoritative construction regarding that issue.

Likewise, the reference to respondent's "concession", is inapt. Respondent was merely making a contrasting point to an overstated claim of petitioners on a different point. (Brief in Opposition to Petition for Writ of Certiorari, p. 9).

This misconstruction of Proposition 1 by petitioners substantially damages their argument comparing the instant case to *Hunter v. Erikson,* 393 U.S. 385 (1969) (see discussion, *infra*).

Petitioners' claim of damage, is essentially that the remedy that may have been available under the pre-Proposition 1 California Constitution to vindicate the state-court-cognizable harm of de facto segregation is no longer available.

But this point is unconvincing because it is well established that:

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellant's constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took.... If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation." *Reitman v. Mulkey*

387 U.S. 369 (1967), quoted approvingly in *Dayton Board of Education v. Brinkman,* 433 U.S. 406 at 414 (1978). (See also *Hunter v. Erickson, supra,* wherein it was held that "We do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment," at p. 390, note 5)

Neither can petitioners find support in *Reitman v. Mulkey, supra,* as they imply. (Pet. at pp. 66, 90). In *Mulkey* this Court found California Proposition 14 un-

constitutional. But there, the question was not whether equal protection was being violated by the removal of a statute, but whether state action could be found to have a close enough nexus to activities which were patently in violation of the equal protection clause. In the case at bench, of course, the rescission of an existing state law exposed all parties to the express protection of the Fourteenth Amendment, not to its violation.

Petitioners' reliance on *Hunter v. Erickson, supra,* is misplaced for two reasons. In *Hunter,* the repeal of the existing law exposed minorities to unequal protection of the law in housing, a circumstance which is itself in violation of the Fourteenth Amendment. Thus, *Hunter* is similar to *Mulkey, supra,* where the state action of repealing a law exposed minorities to violations of the Fourteenth amendment. Once again, in the case at bench, the removal of the existing law exposed minorities to the protection of the Fourteenth Amendment.

Moreover, it is in this situation that petitioners' misconstruction of Proposition 1, discussed, *supra,* bears further against their contention. Petitioners attempt to find themselves similarly situated to the plaintiffs in *Hunter* on the basis that the restrictions on mandatory busing that result from the passage of Proposition 1 are greater for those who seek mandatory busing for integration than for those who seek it because of overcrowded schools or for helping handicapped children. (Pet. at pp. 30-31, 45).

But because petitioners misconstrued Proposition 1 on this point, they are denied what ever benefits of argument they thought they may have gained in the context of *Hunter v. Erickson, supra,* 393 U.S. 385. (see also *James v. Valtierra,* 402 U.S. 137, 140-141 (1970), wherein this Court narrows the application of *Hunter*).

Thus the law is clear that the mere removal of an existing state law does not, in and of itself, constitute a violation of the Fourteenth Amendment. Rather, only if that removal exposes the plaintiffs to a violation of the Fourteenth Amendment, is there a federally cognizable harm. In the case at bench, the mere removal of a state law exposed the plaintiffs to no more than the express protection of the Fourteenth Amendment.

Moreover, the foregoing propositions of law have been recently applied to an almost identical situation as in the instant case. In *Brown v. Califano,* 627 F.2d 1221 (D.C. Cir. 1980), the respected Senior Circuit Judge Bazelon was called to rule on whether the equal protection clause of the Fourteenth Amendment was violated by a Congressional amendment that withdrew from HEW the right to threaten cut-off of funds to local school districts that did not implement mandatory busing under certain circumstances.

There, as in the instant case, plaintiff claimed that such an action "inhibited desegregation" by removing one of the means to do so. 627 F.2d at 1229. Judge Bazelon held that the intent of the amendment was "to ensure that mandatory busing orders derive either from local officials or federal courts." id at 1231. This is remarkably similar to the effect of Proposition 1 in that Proposition 1 allows mandatory busing ordered either by the Federal Court or at the choice of a local school board.

Judge Bazelon went on to hold that the amendment would be constitutionally flawed if it "diluted rather than enforced equal protection guarantees." id. p. 1233. But, he went on, "As the amendments also leave in place the enforcement options at the Department of Justice, we cannot find that on their face they restrict, abrogate, or dilute the guarantee of equal protection." id. at 1234. Similarly, the full powers of

the federal Justice Department and the federal courts are available to enforce the Fourteenth Amendment in California.

Finally, in the instant case in September 1980, Justice Rhenquist analyzed the constitutionality of Proposition 1 in the following language:

> ". . . inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of (the) federal constitution."

Board of Education of City of Los Angeles v. Superior Court, 448 U.S. 1343, 1345 (1980).

Amicus concurs. An uncontradicted body of this Court's decisions holds that the mere removal of a state law that yields all parties the unlimited protection of the Fourteenth Amendment is not a violation of the Fourteenth Amendment, and thus does not expose petitioners to any federally cognizable wrong.

II

FUNDAMENTAL PRINCIPLES OF FEDERALISM ENCOURAGE STATES TO EXERCISE THEIR RIGHT TO EXPERIMENT WITH THE EXPANSION AND RETRACTION OF PRIVILEGES AS LONG AS THEY DO NOT CONTRAVENE THE REQUIREMENTS OF THE UNITED STATES CONSTITUTION.

This Court declared, shortly after the close of the Civil War, that the formation of the United States:

> "by no means implies the loss of distinct and individual existence, or the right of self-government by the States . . . (T)he preservation of the States, and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."
> *Texas v. White,* 74 U.S. (7 Wall.) 700, 725 (1868).

This classic expression of the ideal of dual sovereignty uttered by this court at a time when many of our states had good reason to doubt their function, continues to hold wisdom today. Just as the Civil War raised doubts as to the proper role of the States in the federalist form of government, so today, the States are uncertain of the scope of their sovereignty.

The statesman and scholar Archibald Cox recently raised this question regarding this Court's then pending decision in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978):

> "The Court will not fully canvass that question however, unless it also considers whether our constitutional philosophy calls for a monolithic judgment by the national judiciary or for leaving the difficult problem of affirmative action to smaller and varied solutions likely to be produced by fifty different states." Cox, "Federalism and Individual Rights Under the Burger Court", 73 *Nw Law Review* I (1978).

A similar point was made by Mr. Justice Brennan in the following language:

> "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."

Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 491 (1977).

Thus, the too-ready intervention by federal courts may tend to stunt the growth of state constitutional law by curtailing opportunities for state adjudication.

The vitality of the federalism system resides in the opportunity for fifty separate governments to try fifty different approaches to solving the common problems that face the nation as a whole. As in all human endeavours, mistakes will be made. False paths will be followed. Dead ends will be reached.

But it is a maxim of human achievement that one must fail many times before succeeding. If there is fear of failure, there is little chance for success. As it is true in individuals, so it is true in governments.

The genius of federalism is that each mistake hurts only one state, yet each success benefits the entire nation.

The case at bench brings these propositions in to vivid relief. Virtually every state today faces the challenge of bringing social justice, in all its facets, to those who suffer from its absence. At the same time, the overburdening demands on the public treasury require that we addess these social challenges in inventive, practical and economic ways.

Several years ago California tried to address one of those problems by going beyond the requirements of the Fourteenth Amendment and seek possible remedies to the problem of *de facto* segregation. But as time passed, and as

the resource base of the public sector was reduced, it became more and more apparent to Californians of every race and ethnic background, that the experiment was not working, and that the resources were needed to provide minimum state services.

Thus Californians overwhelmingly chose to return to the wisdom of the United States Constitution, a wisdom born of generations of careful balancing and measuring. Superior justice is not always the most extreme. This court has even found it necessary to limit freedom of speech in rare cases, believing correctly that justice was thereby better served. *American Communications Assoc. v. Douds,* 339 U.S. 382 (1950).

To the end of encouraging experimentation amongst the states in areas that do not contravene the United States Constitution, *amicus* submits that this Court should be guided by its words in *Texas v. White, supra* and by the advise of Mr. Justice Brennan in the above cited article, and keep open the doors to the United States Constitution to all those states which, from time to time, may dare to leave its comfort and security for the invigorating but sometimes inhospitable air of unknown mountain tops. In other words, the general States must be allowed to contract, as well as expand, their Constitutions, as long as they do not contravene the U.S. Constitution.

If this court were to hold otherwise, such a ruling would have a chilling effect on the future innovations and experiments of the fifty states, and could only be expected to reduce experimentation in favor of suspect classes in the future.

CONCLUSION

For the foregoing reasons the judgment of the California Court of Appeal second appeallate district should be affirmed.

Respectfully submitted.

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